Noel Canning, a Division of the Noel Corporation, *and* Teamsters Local 760. Case 19–CA–032872

February 8, 2012

DECISION AND ORDER

BY MEMBERS HAYES, FLYNN, AND BLOCK

On September 26, 2011, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent, Noel Canning, filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions, to clarify his remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Noel Canning, a division of the Noel Corporation, Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by refusing to reduce to writing and to execute a collective-bargaining agreement reached with the Union, Teamsters Local 760, embodying the terms agreed to on December 8, 2010, and ratified by the employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the parties' agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010, and ratified by the employees on December 15, 2010, for all employees in the following appropriate bargaining unit:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

(b) Give retroactive effect, to October 1, 2010, to the provisions of the collective-bargaining agreement reached with the Union on December 8, 2010, and ratified by the employees on December 15, 2010, and apply the terms of that agreement for the agreed-upon 2-year duration, through September 30, 2012.

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent, through Noel's comments that he would give employees what they wanted if only they would get out of the Union, independently violated Sec. 8(a)(1).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] The Respondent shall make whole the unit employees for any losses attributable to its failure to execute the 2010 agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent shall also make whole its unit employees by making delinquent contributions to the Union Pension Trust Fund that have not been made since October 1, 2010, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. To the extent that an employee has made personal contributions to the Union Pension Trust Fund that have been accepted by the Fund in lieu of Respondent's delinquent contributions during the period of the delinquency, Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that Respondent otherwise owes the Fund.

[4] We have modified the judge's recommended Order to include the appropriate remedial language for the violation found, and we have substituted a new notice to conform to the Order as modified. We note, specifically, that the modified Order does not require the Respondent to execute a contract with a 3-year term, but only to execute a contract embodying the agreement reached by the parties on December 8, 2010, and ratified by the employees on December 15, 2010, which agreement, as found by the judge, was for a 2-year term.

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

(c) Make all affected unit employees and the union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

(d) Make all affected unit employees whole, with interest, for the retroactive bonus (made to compensate employees for the length of time it took to get a contract) agreed upon by the Respondent and the Union on December 8, 2010.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility and place of business in Yakima, Washington, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union in good faith by not reducing to writing and signing a collective-bargaining agreement reached with the Union, embodying the terms agreed to on December 8, 2010, and ratified by employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010, and ratified by employees on December 15, 2010, for all employees in the following appropriate bargaining unit:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

WE WILL give retroactive effect, to October 1, 2010, to the collective-bargaining agreement, and apply the terms of that agreement for the agreed-upon 2-year duration, through September 30, 2012.

WE WILL make our unit employees and the union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

WE WILL make our unit employees whole, with interest, for the retroactive bonus.

NOEL CANNING, A DIVISION OF THE NOEL CORP.

Ryan Connolly, Esq., for the General Counsel.
Gary Lofland, Esq. (Lofland and Associates), of Yakima, Washington, for the Respondent.
Bob Koerner, Business Representative, Teamsters Local 760, of Yakima, Washington for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Yakima, Washington, on June 21 and 22, 2011. The charge was filed by Teamsters Local 760 (the Union) on December 15, 2010, and an amended charge was filed by the Union on February 7, 2011. Thereafter, on March 31, 2011, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Noel Canning, a Division of the Noel Corporation (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington state corporation, maintains an office and place of business in Yakima, Washington, where it is engaged in the business of bottling and distributing Pepsi-Cola products. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $500,000, and annually purchases and receives at its Yakima, Washington facility goods, products, and materials valued in excess of $50,000 directly from points outside the State of Washington. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by certain statements made during the course of bargaining, and whether the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to execute and enter into a collective-bargaining agreement verbally agreed to by the parties during negotiations.

B. Facts

The parties had maintained a long-standing collective-bargaining relationship over successive collective-bargaining agreements. The prior collective-bargaining agreement extended from May 1, 2007, to April 30, 2010.[1] The collective-bargaining unit is described as follows:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

The current set of negotiations commenced on June 26. Negotiations took place on June 26, July 7, August 19, October 26, November 15, and December 8. The complaint alleges and the Respondent denies that the parties reached agreement on a contract during the December 8 bargaining session.

All the negotiations took place at the Union's premises. During the course of bargaining, the chief negotiator for the Union was Business Representative Bob Koerner. He was accompanied by the shop steward, Eddie Ford, and union member Matt Urlacher; however, during the December 8 session, Ford, who had sustained an injury, was replaced by union member Mark Weber. The Respondent was represented by Roger Noel, the Respondent's owner, Justin Noel, vice-president, Sam Brackney, plant manager, Larry Estes, chief financial officer, vice-president, and secretary, and Cindi Zimmerman, treasurer, although not all of these individuals were present at all the negotiating sessions. The record does not reflect whether there was a chief negotiator designated by the Respondent.

Business Representative Koerner took notes at each bargaining session. The notes were introduced into evidence. Koerner testified that Zimmerman and other members of the Respondent's negotiating team took notes at various sessions. Mark Weber testified, infra, that he observed Zimmerman taking notes at the December 8 session.

The essential sticking points during negotiations involved wage and pension issues.[2] All other matters had been resolved.

[1] All dates or time periods hereinafter are within 2010, unless otherwise specified.

[2] During negotiations, the Respondent and Union agreed to permit the employees to decide whether to remain with the Union's pension trust or to forego the Union's pension trust in favor of the Respondent's pension plan. A vote was taken, apparently sometime between the October 26 and November 15 bargaining sessions, and the employees voted to remain with the Union's pension trust.

As testified to by Koerner and Weber, agreement was reached on December 8 that the Union would take back two wage/pension proposals to the unit employees for a secret-ballot vote; that the Union and Respondent would be bound by the outcome of the vote;[3] and that subject to the outcome of the vote, an agreement had been reached.

Koerner testified that on December 8, after other proposals were discussed, the Union countered with a proposal of a 2-year agreement providing for a 45-cents-per-hour increase for each of the 2 years, with the employees to determine by vote how much of the wage increase they wanted to divert to the Union's pension plan; further, the Respondent would continue to fully pay for the employees' medical insurance through the Respondent's medical plan. And, in addition, the employees would receive a bonus of $485 ($380 after taxes) to compensate them for the length of time it had taken to reach a successor agreement.

Koerner testified that the Respondent countered with 40 cents per hour for each year, also with the foregoing understandings regarding the bonus and medical insurance. Although the Union was agreeable to the Respondent's counter-proposal, the Respondent believed the employees would be better off and would be putting more money in their pockets if they accepted an earlier offer proposed by the Respondent. This offer provided that the employees be required to contribute to a portion of their medical insurance; that for the first year of the contract they would receive a wage increase of 78 cents per hour, and an additional 12 cents per hour for the Union's pension trust; and that for the second year of the contract they would receive a wage increase of 33 cents per hour, with no additional amount for the Union's pension trust.

Koerner then proposed that the employees vote on each of the alternative proposals as "A" and "B" proposals. This was agreeable to the Respondent. Koerner agreed the Union would remain neutral and would not state a preference for either proposal. It was further understood and agreed that whichever proposal was selected by the employees, the bonus of $485 ($380 after taxes) would remain the same. The December 8 meeting ended, according to Koerner, when the parties shook hands and Koerner and Zimmerman agreed that Zimmerman would forward to him an email setting forth the understanding they had reached.

Weber, a current employee, has worked for the Respondent for 32 years. As noted, he was substituting for Shop Steward Ford at the December 8 session, the first bargaining session he had attended. Weber testified he "was there as a witness just to take down notes basically and then go back to the Plant and tell everybody how it had gone." Weber testified that when an agreement had been reached at that session he wrote down what had been agreed to and went over the items "point by point" with Zimmerman "right at the very end to make sure that I had everything correct in my mind about the two proposals I was going to take back." He explained this to the group, namely, that he had to make sure he had everything right, and reiterated to the group what had been agreed upon. Weber testified that Zimmerman "agreed with everything" step by step, stating "that's correct" as Weber reviewed from his notes each component of the "final two proposals that the Company and Bob [Koerner] had ironed out to take back to the employees for them to decide which of either they wanted to do and accept or not."

Weber further testified that after he got Zimmerman's confirmation that he "had everything down correctly," Roger Noel said he (Noel) was confused about whether the starting date of the new contract would be October 1 or November 1. Both Weber and Zimmerman simultaneously said "October 1," and Noel said, "then let's do it." And, according to Weber, "that was the end . . . we were done." Plant Manager Brackney nodded in agreement, and no one voiced any objections to the agreed upon terms as reiterated by Weber and confirmed by Zimmerman. CFO Estes said, "[W]ell, write it up and get it sent over." Weber thanked everyone for letting him be a part of the process, and was the first to leave.

Weber's notes of the agreement, introduced into evidence, include the following: "Oct. 1, 2 year contract, Negotiations begin in September after Labor Day." The latter reference, according to Weber, concerns the next set of negotiations for the succeeding contract beginning in 2012. In this regard, Weber testified he asked Zimmerman whether the parties could begin the next set of negotiations while the contract was still in effect in order to avoid the instant awkward situation of beginning negotiations after the expiration of the contract. Zimmerman said, according to Weber, that we could start negotiations "right after Labor Day and by October 1st [2012] we could have a new contract ready to go and so we wouldn't be in this same boat again."

During the course of negotiations, according to Weber, Roger Noel twice "threw up his hands and said if you just get out of the Union, I'll give you anything you want." On one occasion Brackney, and perhaps others on the Respondent's negotiating team, said to Noel, "you can't say that," and Noel said, "I know I can't say that—this guy—pointing at Bob Koerner there—he said this guy will slap a lawsuit on me . . . something to that regard." On the second occasion, according to Weber, Brackney again told Noel he couldn't say that, and Noel replied, "oh, I know that—I didn't mean it."[4]

Although there is some minor variance in the testimony of Koerner and Weber,[5] their testimony is consistent regarding the terms of the agreement and how it was to be voted on by the unit employees; and the notes they each took are consistent with this understanding.

On the following workday morning, December 9, in the lunchroom, in the presence of Plant Manager Brackney, Weber

[3] According to Koerner, the Union was to remain neutral prior to the vote and not advocate its position.

[4] Koerner also testified that Brackney cautioned Noel about making these statements; however, on each occasion Noel simply responded, "I know." Unlike Weber, Koerner did not testify that Noel said he didn't mean it. The Respondent's witnesses testified that Noel stated something to the effect that the employees would be better off without the Union.

[5] For example, Koerner testified that Zimmerman recounted the terms of the agreement to Weber, whereas Weber testified that he recounted each term of the agreement to Zimmerman who replied, "that's correct."

was explaining the terms of the two proposals to the employees at work. The employees, according to Weber, very much liked the "40–40" proposal as it came to be known. At some point that morning, Weber and Brackney agreed that they were both very happy that "it was all over" because the employees had been without a contract for quite some time. Brackney said, "You guys got a good deal." Weber agreed.

Later that day, according to Weber, he and Brackney talked about the "retro check pool"—the employees would each put in $10 and the highest poker hand, derived from the check numbers on the retroactive checks to be paid to the employees to compensate them for the lost wages during the course of bargaining, would win the pool.

Apparently on the same day, Weber learned from Koerner that Roger Noel was changing his mind regarding the agreement. On that day Weber went around the plant telling employees that Roger Noel was backing off on the agreement. While he was talking with two employees, Brackney happened to come by and Weber reviewed the terms of the "40-40" proposal with the three of them. Weber said to Brackney, "You remember now Sam when I asked Cindi [Zimmerman]—I have to get this all right and everything and Sam completed my sentence for me. He said yes, you had to get it all right because you had to take it back to the guys the next day and be able to tell them what it was." Weber said that Roger Noel was now changing his mind, and Brackney said he did not know why Roger Noel would change his mind.

As noted above, Koerner testified that at the conclusion of the December 8 negotiating session, he asked Zimmerman to email to him the agreement they had just reached, and shook hands with each member of the Respondent's negotiating team. He also asked if he could use the Respondent's conference room to conduct the vote of the unit members. It was agreed that the room would be available to the Union for the vote. Koerner's notes of the session state, inter alia, "Company will send typed version of (TA)."[6]

On the following day, December 9, Zimmerman sent Koerner an email entitled "Proposal," which differed significantly from the terms of the Union's preference set forth above: the 40-cent-per-hour increase for each of the 2 years of the agreement remained the same, but for each of the 2 years the "Pension contribution [was] not to exceed $.10 of the $.40." Nothing was said about the Respondent's alternative preference.

On December 10, in the morning, Koerner sent Zimmerman an email stating that the attachment to the email "shows what was Tentatively Agreed on December 9,[7] (sic) 2010. We need get this resolved prior to Wednesday. Mark [Weber] and Matt [Urlacher] have been explaining to the other employees the proposals." The attachment to the email sets forth the Union's understanding that "The wage pension diversion for each year was proposed as $.40 per hour with the employees diverting whatever portion to pension which would be voted by the group."

On the morning of December 10, Koerner posted a "Notice" at the Respondent's premises to "All Bargaining Unit Members" announcing a "Vote for Contract" on Wednesday December 15, 2010, at the Respondent's "Front Meeting Room."

On the evening of December 10, Koerner spoke by telephone with Roger Noel; Zimmerman and Estes were also listening on a speakerphone. It was a confrontational conversation. Koerner told Noel the Respondent's foregoing email proposal was not what was agreed to, and that the $.10 pension amount had never even been discussed at the table. Noel, according to Koerner, simply replied that was the amount he was going to allow the employees to put in the pension trust. Noel also said, according to Koerner, "that it [the agreement] wasn't in writing and it was his company and he had the right to make the decisions." Koerner disagreed, saying it was not Noel's right to renege on the tentative agreement, and that the Union intended to go ahead with the ratification vote as agreed upon.[8]

The ratification vote was conducted on December 15, as scheduled. The unit employees overwhelmingly approved the "40–40" proposal by a vote of 37 to 2, voting to divert the total amount of the wage increase into the pension trust. Immediately after the vote Koerner walked across the street from the plant meeting room to the corporate offices, and showed the tally of ballots to Roger Noel and Brackney. Noel wadded up the tally of ballots and made some "rude comment" as he threw it back at Koerner.

On the following day Koerner received two letters from Roger Noel. One stating, inter alia, "It is not appropriate to vote an offer that was not made by the employer," and further stating that the parties were at impasse. The second letter advised Koerner to refer all further communications in writing to Respondent's attorney.

Cynthia Zimmerman, Respondent's treasurer, testified that during the 2-1/2-hour December 8 negotiating session there was at first some initial confusion over the cost to employees

[6] Koerner's testimony is not inconsistent with that of Weber regarding who would send the typed version of the agreement to whom, as Weber had left the meeting before its conclusion; it is probable that both versions are correct.

[7] This date is obviously incorrect as no further negotiations took place after December 8.

[8] The Respondent points out in its brief some rather confusing language contained in Koerner's Board affidavit, as follows: "I told Roger [Noel] that I was voting the contract on Wednesday and that I would vote the contract that we TA'd during the December 8 meeting noting (sic) different from that TA." (Emphasis supplied.) The Respondent maintains that this language should be interpreted to mean that Koerner intended to have the employees vote on something "different" than what he believed had been agreed upon on December 8. Koerner, when questioned about this, believed the language in his affidavit was correct, and that the "difference" between what was TA'd and voted upon was simply a matter of arithmetic. Thus, he explained the notes he took of the agreement on December 8, state, regarding the retroactive bonus, "Retro 173.3 x 7 months [x 40 cents per hour]." This translates to $380 after taxes, a fixed amount on which the parties had agreed and which was a component of either alternative proposal. While Koerner so testified, I believe it is more likely that the quoted language also confused Koerner, and that the affidavit simply contained a spelling error. That is, it should state, ". . . nothing different from TA" rather than "noting different from TA." In either event, there is no showing that the employees voted on anything different from what had been agreed to on December 8.

should they contribute to the medical plan, as proposed by the Respondent. Then, according to Zimmerman the parties "kind of talked back and forth and kind of reached what might've been common ground. Then there was (sic) still some issues to work out. Roger [Noel] was tired, we were all confused." [9] Then Mark Weber asked Zimmerman some "questions," as follows:

> He went through the 40 cents an hour and whether or not the employees could determine how much went into the pension. Then we went over the second proposal, which was a larger amount of money per hour and they [the employees] contributed to the medical expense.

In response to Weber's questions, Zimmerman simply replied, "Yes that's what we have been talking about," but she did not acknowledge to Weber that an agreement had been reached. After Weber left, according to Zimmerman, "We were talking about this and that. Then the meeting just kind of ended" and "We said we would go back and write up our offer. When we left, we all shook hands and Bob said, 'Put it in writing. We said okay.'" According to Zimmerman—and also according to Brackney and Estes— only Roger Noel had the authority to say yes or no on behalf of the Respondent, and Noel never said during the meeting anything to the effect that, "Yes, I agree to the proposal that employees will be able to determine the amount of wage increases that will be allocated to pension."

Koerner testified that Zimmerman took notes during the bargaining sessions and his affidavit specifies that he observed Zimmerman taking notes at the December 8 session; and Weber testified that he too observed Zimmerman taking notes during the December 8 session. However, Zimmerman neither produced any notes nor testified that she did not take notes during the December 8 session or any of the earlier sessions, nor otherwise explained the absence of her notes.

The Respondent called Matthew Urlacher as a witness. Urlacher, a member of the bargaining unit and of the Union's bargaining team, has worked for the Respondent for 41 years. Urlacher testified that at the December 8 meeting both sides "got a little loud . . . [and] disagreed quite a bit on . . . what they believe is better." After a break and the parties went back to the table, "It was calmer. I don't know exactly what they were talking about when they got back. Roger and Bob were mainly talking back and forth." Urlacher was not asked what had been agreed upon during the December 8 session, what the respective positions of the parties were, or what issues remained to be resolved. Although he voted in the ratification vote, he was not asked whether the ratification vote reflected what had been agreed to on December 8.

Plant Manager Sam Brackney testified that shortly before the December 8 meeting ended, Weber asked questions about "some of the things" that had been discussed, and he wrote it down. Zimmerman did not tell Weber that the company had "agreed" the employees could choose the amount of the wage increase that would be diverted to the pension plan: "She did not say agreed. She said we have discussed it."

The meeting ended with the understanding that the Respondent would "write up a proposal and present it to [the Union]."

Regarding his various conversations with Weber about the matter, Brackney testified that the following morning he did discuss with Weber what went on at the meeting, and "believes" he did say to Weber, "I'm glad this is almost over." Brackney did not testify about what he discussed with Weber that morning, and maintains the remark that he made referred not to any agreement reached at the meeting, but rather to the fact that he knew the Respondent was going to present to the Union a new proposal, "and I knew what the offer was going to be from the company and I knew the employees would accept that offer." In this regard, Brackney testified that he had been made aware of this new offer by an email sent to him by Zimmerman. However, when the email from Zimmerman was produced by the Respondent, upon the General Counsel's demand at the hearing, showing that the email from Zimmerman was a copy of the email Zimmerman had sent to Koerner at 4:02 p.m. and forwarded to Brackney at 4:11 p.m., Brackney recanted his prior testimony, said he had been mistaken, and that he had learned about the proposal during a face-to-face conversation with Zimmerman that morning prior to his conversation with Weber. Zimmerman told him what the proposal was going to be and asked him if he thought the employees would accept it, and Brackney told her, "Yeah, I'm pretty sure they will accept it." Brackney did not testify why he thought the Union would accept such an offer.

Brackney was not asked about his later conversation with Weber that afternoon regarding the "retro check pool," as testified to by Weber, supra.

The following day, according to Brackney, he and Weber did have a further conversation about the matter. They were talking about what Weber "believed" the December 8 offer was, and what Brackney "knew" the new offer was. Weber thought the "40–40" offer gave the employees the choice of determining how much went into the pension trust fund. Brackney simply told Weber that was not the Respondent's offer. However, he did not tell Weber what the Respondent's new offer was because he "wasn't 100% sure, but I had not seen it, but I knew what it was." However, as noted, Brackney had earlier testified that he had in fact seen the new offer the day before and "knew the employees would accept that offer."

Roger Noel testified that during the December 8 negotiations, "We talked about wages, we talked about pension, what's conversion, all kinds of things." It appeared to Noel that Koerner was trying to "push" the Respondent for a "commitment." Noel did not testify regarding the details or even the nature of the "commitment," but merely testified the Respondent was not ready to make any kind of commitment to the Union. Noel did not testify about Weber's questions to Zimmerman or Zimmerman's responses to Weber. At the end of the meeting, according to Noel, "we said we'd get back to him [Koerner]. We'd give him a written proposal." During the phone conversation with Koerner on December 10, Noel said

[9] Zimmerman was not asked to elaborate and did not elaborate. She was not asked to explain and did not explain the parameters of the "common ground" that was reached regarding the parties' respective preferences; or what "issues to work out" remained to be resolved; or who were "confused" and what they were confused about after the initial confusion over the medical plan had been resolved.

he wanted to continue negotiations with Koerner, but Koerner refused to negotiate further.

CFO Larry Estes testified that, "We turned most of it [the negotiations] over to Cindy [Zimmerman.]" Estes did not testify that the December 8 meeting was chaotic or disorganized or that he didn't know or understand what was being negotiated during the course of the meeting. Estes did not testify regarding Weber's questions to Zimmerman or Zimmerman's responses to Weber. At the end of the meeting, Koerner said, "you guys go back and write something up and get it back to me." Estes said. "yes, we will."

On January 13, 2011, the Union sent copies of the new collective-bargaining agreement,[10] executed by John Parks, secretary-treasurer of the Union, reflecting the terms ratified by the unit members as discussed above. Koerner also hand delivered an executed copy to the Respondent. To date the Respondent has refused to execute the contract or honor the terms of the new agreement, including the payment of the retroactive bonus to the employees.

Analysis and Conclusions

I found Koerner and Weber[11] to be highly credible witnesses, with their contemporaneous notes of the December 8 meeting reinforcing their mutually consistent testimony regarding the agreement reached at that meeting. In contrast, it is significant that none of the Respondent's witnesses either produced notes of the meeting or explained why no notes were available. Nor did Zimmerman contradict Weber's testimony that he observed her taking notes. I therefore conclude that Zimmerman did in fact take notes and that her notes would not support the Respondent's position that no agreement was reached.

The testimony of Noel, Zimmerman, Brackney, and Estes was abbreviated, conclusionary, nonspecific, and unconvincing. It is significant that none of these individuals stated what proposals were in fact made by either the Respondent or the Union during the December 8 session. Nor did they deny Weber's very precise testimony in which he specifically quoted Noel. Thus, according to Weber's testimony, at the conclusion of the December 8 meeting, after the terms of the agreement had been reviewed and confirmed by Weber and Zimmerman, and after it had been further confirmed that the new contract would begin October 1, Noel finalized this understanding and meeting of the minds by concluding the substantive portion of the meeting with his comment, "then let's do it." As noted, Weber's recollection of this colloquy stands unrebutted, and I credit Weber.

Brackney's testimony regarding his various conversations with Weber on December 9 and 10 is also confusing. The scenario presented by Brackney regarding his discussion with Weber on the morning of December 9 is nonsensical and obviously contrived. According to Brackney, he told Weber he, too, was happy the matter was "almost over." Brackney claims he made this statement not because he was agreeing with Weber that an agreement had been reached, but rather because he knew that a new proposal (of which the Union had not yet been apprised, and which on its face was clearly inferior to the proposal the Union favored during negotiations) would nonetheless be accepted by the Union. Brackney's purported prescience in this regard defies credulity. Clearly, Brackney's testimony is false, and he made this statement to Weber because he and Weber were of the common understanding that a new contract had in fact been reached. I so find.

The Respondent maintains that because it strongly preferred its own pension plan over the Union's pension trust, or for other reasons, it would not have agreed to permit the employees to unilaterally determine how much of any wage increase would be diverted into the Union's pension trust. This contention is belied by the fact that on November 15 the Respondent made this very proposal. Thus, the Respondent's first wage and pension proposal, presented to the Union at the November 15 bargaining session, was a written proposal as follows: 33 cents per hour for each year of a 2-year contract, with the additional component that "Employees to decide breakdown between wages and pension." Accordingly, I find no merit to the Respondent's contention.

Furthermore, given the fact that the Respondent did initiate such a written proposal on November 15, and the Union countered at the next negotiating session on December 8 with 45 cents per year rather than 33 cents, as Koerner testified, supra, it is reasonable to assume, again as Koerner testified, that it was the Respondent that proposed a compromise figure of 40 cents per hour to which the Union agreed. I so find.

The Respondent maintains that Washington State law precludes legal enforcement of verbal contractual agreements. Whatever the parameters of Washington State law regarding verbal contractual agreements, this matter is not subject to state law. Under Federal law, it is clear that the verbal agreement reached here is valid and enforceable. Once a verbal agreement is reached by the parties, they are obligated to abide by the terms of the agreement even though those terms have not been reduced to writing. *H. J. Heinz v. NLRB*, 311 U.S. 514 (1941); *Young Women's Christian Association (YWCA)*, 349 NLRB 762, 771 (2007); *Sunrise Nursing Home, Inc*., 325 NLRB 380, 389 (1998).

On the basis of the foregoing, I find that the December 8 bargaining session concluded with a verbal agreement and meeting of the minds on all substantive issues of a collective-bargaining agreement, and, in addition, on the amount of the retroactive bonus for the unit employees. The agreement provided for the Union to conduct a vote of the unit employees to decide which wage/pension option to adopt, and for the Union and Respondent to be bound by the results of the vote. The vote was conducted on December 15; the unit employees voted to accept the "40–40" option which included the component that

[10] While there is no contention by the Respondent that the proffered contract is inaccurate in any respect, the contract language specifies that the contract extends from October 1, 2010, to September 30, 2013. This is apparently incorrect, as the parties had agreed upon a two-year term.

[11] Weber, a long-time employee who was present for just that one December 8 meeting as a replacement for the union steward, has not been shown to harbor any bias. He was simply recruited to attend the meeting at the last minute, in place of the injured union steward, with the understanding that he would be a messenger and report back to the employees what had occurred during negotiations. He explained this role to the Respondent's representatives, and was very careful to insure the accuracy of the information he would relay to the employees at the plant.

the employees would determine how much of the 40 cents to divert to the Union's pension trust; and the Union subsequently prepared, executed, and forwarded the collective-bargaining agreement, reflecting the terms of the ratification vote, to the Respondent. To date the Respondent has failed and refused to pay the employees the agreed-upon retroactive bonus, or to execute and abide by the terms of the contract. By such conduct I find the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act as alleged. *Young Women's Christian Association (YWCA)*, supra.

The complaint also alleges that the statements by Roger Noel during the December 8 bargaining session violate Section 8(a)(1) of the Act. I credit Weber, who testified that during the negotiating session Noel twice said, apparently to Urlacher and Weber who were the only employees present, "If you just get out of the Union, I'll give you anything you want." On the first occasion Noel acknowledged that such a statement might be unlawful, and on the second occasion he stated he didn't mean it. I conclude that Noel's timely and specific retraction of his comments is sufficient to warrant a dismissal of this allegation of the complaint. *Siemens Building Technologies, Inc.*, 345 NLRB 1108, 1115 (2005). Accordingly, this allegation of the complaint is dismissed.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent Noel Canning, A Division of the Noel Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

4. The Respondent has not violated Section 8(a)(1) of the Act as found herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I recommend that it cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act. I shall recommend that the Respondent forthwith sign the collective-bargaining agreement embodying the terms of the agreement between it and the Union as found herein, and give effect to such agreement retroactive to October 1, 2010. I shall further recommend that the Respondent make whole its employees and the union pension trust fund, with interest, for the amounts that would have would have been paid into the trust fund from October 1, 2010. Further, I shall recommend that the Respondent pay to its employees the agreed-upon amount the employees would have received as a retroactive bonus, with interest. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

[Recommended Order omitted from publication.]